IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1975
No. 75-1089

DENNIS ROY CHOATE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD G. SHERMAN

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Counsel for Petitioner

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The petitioner, Dennis Roy Choate, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 15, 1975, reversing the order of the District Court dismissing the indictment against him, and the order of that Honorable Court of Appeals entered in this proceeding on November 21, 1975, denying his petition for rehearing.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals is to be published as a per curiam opinion. It appears in the Appendix, attached hereto, Appendix A. The orders of the Court of Appeals, denying the petition for rehearing and motion for stay of mandate, appear in the Appendix, attached hereto, Appendix B and C, respectively. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, reversing the order of the District Court dismissing the indictment against petitioner in the criminal proceeding below, was filed on September 15, 1975. A timely Petition for Rehearing was denied on November 21, 1975. A timely motion for stay of mandate was denied on December 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

When Evidence As To A Criminal Defendant's Guilt Or Innocence Is Introduced At Trial Before The Trier Of Fact, Is That Defendant Placed In Jeopardy Within The Meaning Of The Fifth Amendment And Title 18, United States Code, § 3731, So As To Deprive The Court Of Appeals Of Jurisdiction To Entertain A Government Appeal From A Subsequent Order Of The District Court Dismissing The Indictment?

II

Does The Court Of Appeals Under Title 18, United States Code, § 3731 Have Jurisdiction To Entertain A Government Appeal From An Order Of The Federal District Court Dismissing An Indictment Against A Defendant Where That Order Was Entered After Trial Had Commenced And Evidence As To Guilt Or Innocence Had Been Introduced Before The Trier of Fact?

III

Was The Order Of The District Court, Dismissing The Indictment Upon A Finding That Government Agents Had Illegally Surreptitiously Entered Defense Counsel's Offices For The Purpose Of Obtaining Evidence Against Petitioner, An Appropriate Exercise Of The Power Of The Federal District Court To Fashion Effective Remedial And Prophylactic Sanctions For Clear And Extreme Governmental Misconduct?

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

STATUTORY PROVISIONS

The statutory provision involved is Title 18, United States Code, § 3731. It provides in pertinent part: "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

STATEMENT OF THE CASE

Petitioner, Dennis Roy Choate, was charged by Indictment of the Federal Grand Jury with two counts of attempting to evade and defeat income tax due and owing in violation of Title 26, United States Code, § 7201. He pled not guilty and moved to dismiss the indictment for the reason that specified illegal activities of a government agent had irremediably violated Petitioner's Fifth and Sixth Amendment rights. A hearing on the motion was set by the District Court for time of trial.

On the date set for trial, December 5, 1974, the District Court first accepted Petitioner's written waiver of trial by jury and request for court trial. Proceeding on that basis the Court then accepted for introduction into evidence, and ordered filed, two written evidenciary stipulations. The first stipulation, prepared by the government, contained all of the documentary evidence the government intended to present and was sufficient, in and of itself, to establish the prima facie case of the offenses alleged. Because of its importance here, a copy of that stipulation is set forth in full in the Appendix as Appendix D.

After the District Court ordered the filing of the two stipulations, which stipulations contained evidence bearing on the guilt or innocence of the Petitioner, the Court then entertained the aforementioned defense motion to dismiss the indictment. The testimony of the government agents involved was taken and introduced into evidence. The District Court then found that the actions of the

government in causing a Customs Department agent to surreptitiously enter defense counsel's office to obtain evidence against the defendant irremediably violated Petitioner's Sixth Amendment rights.

The District Court then dismissed the indictment against Petitioner on this basis. The government filed a timely notice of appeal and on appeal the Court of Appeals for the Ninth Circuit reversed the order of the District Court, holding that (1) the Court of Appeals had jurisdiction to entertain the government appeal and (2) there had been no showing of prejudice to the defendant as a result of the illegal government invasion of defense counsel's office. This Petition For Writ Of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I

The Decision Below, With Respect To The Issue Of Jurisdiction To Entertain This Government Appeal, Is In Conflict In Principle With Decisions Of This Honorable Court And Other Circuit Courts

Of Appeals, Operates To Deprive Defendants Of Their Fifth Amendment Jeopardy Rights, And Erroneously Construes 18 U.S.C. § 3731 As Amended In 1971.

II

The Decision Below, With Respect To The Propriety Of The Order Of The District Court Dismissing The Indictment Because Of Illegal Governmental Surreptitious Invasion Of Defense Counsel's Offices, Impermissibly Condones The Most Offensive Type Of Illegal Governmental Activity, Deprives The District Court Of The Ability To Fashion Appropriate Remedial And Prophylactic Sanctions, And Misapplies The Standards Announced By This Honorable Court For Evaluating Questions Of Prejudice In Sixth Amendment Right To Counsel Cases.

DISCUSSION

I

Jurisdiction

After Petitioner's waiver of jury trial was taken by the District Court on the date set for trial, two stipulations

were entered into evidence and ordered filed. The primary stipulation, set forth in the Appendix as Appendix D, contained nearly all of the evidence the government intended to present as to Petitioner's guilt, and was sufficient in factual content to support a guilty verdict. The question here is whether, after such a factual stipulation bearing upon the Petitioner's guilt has been entered into evidence before the trier of fact, the government has the right to appeal from a subsequent order of the District Court dismissing the Indictment because of deliberate illegal activities of government agencies.

As The Court of Appeals correctly determined, the issue is whether Petitioner had been placed in "jeopardy" within the meaning of the Fifth Amendment and the language of Title 18, United States Code, § 3731, forbidding government appeals where "jeopardy" had attached. In Serfass v. United States (1975) 420 U.S. 377, 95 S.Ct. 1055, this Court stated, at 1062, that "In a nonjury trial, jeopardy attaches when the Court begins to

hear evidence." Here, all of the facts necessary to establish Petitioner's guilt were placed into evidence before the Court by the stipulation.

To the same effect is the decision of the Ninth Circuit itself in United States v. Hill (9th Cir. 1972) 473 F.2d 759, 761, where the Court of Appeals ruled that in a court trial "jeopardy" attaches when the accused has been indicted and arraigned, enters a plea, and the trier of fact commences to hear evidence. And as the Court in Hill pointed out, the evidence taken which serves as the dividing line may be the written as well as oral testimony of a witness.

Finally, we would advert to a recent germane decision of the California Supreme Court in Bunnell v. Superior Court (1975) 13 Cal.3d 592. In that case the matter was submitted to the Trial Court for decision based upon the Reporter's Transcript of the Preliminary Hearing with each side reserving the right to present additional evidence. There was a plea bargain that the defendant would not be convicted of first degree murder, and the

Trial Court, in fact, convicted him of second degree murder.

On appeal the judgment was reversed on unrelated grounds, and the question arose as to whether the defendant had been placed in jeopardy on charges of first degree murder. The holding of the California Supreme Court, at 13 Cal.3d 601-602, was as follows:

> "Under the related doctrines of double jeopardy and former acquittal, jeopardy attaches when a defendant is placed on trial on an accusatory pleading in a court of competent jurisdiction, and a jury is impaneled and sworn, or, if jury trial has been waived, the trial 'entered upon' by the reception of evidence or otherwise. (authority cited) A defendant who has been convicted of a lesser degree or lesser included offense than that charged in the accusatory pleading is deemed to have been acquitted of the greater charge. He may not be retried for any offense of

which he has been acquitted, whether expressly or impliedly, notwithstanding a subsequent reversal of the judgment on appeal. (authorities cited)

"A defendant who submits his case for decision on the basis of the transcript of the preliminary examination agrees that the transcript may be considered in lieu of the personal testimony of the witnesses who appeared at the preliminary hearing. His trial is therefore 'entered upon' when the stipulation to submit the case is accepted by the court. That acceptance is analogous to the swearing of a witness or the reception of evidence and, for purposes of placing the defendant in jeopardy has the same effect." (emphasis supplied)

In the case at bench, Petitioner entered a not guilty plea, waived trial by jury, and evidence was then entered bearing on the question of his guilt or

innocence. The subsequent dismissal order thus was had at a time when Petitioner had been placed in "jeopardy". It is therefore clear that the government's appeal from that order was barred by the express language of Title 18, United States Code, § 3731 and the mandate of the Fifth Amendment.

II

Dismissal

The moving papers in support of the motion to dismiss the indictment contained the affidavits of Petitioner and his counsel. The affidavit of Petitioner averred that he had been contacted by an individual who asserted that he (the individual) had access to United States Customs files on Petitioner and would sell the information therein to Petitioner. Petitioner, not desiring to have any dealings with that individual informed his counsel who advised Petitioner to have the individual contact said counsel. Petitioner then so advised that said individual.

The affidavit of said counsel, Mr. Sherman, averred that shortly thereafter he had a meeting in his law office with one "Tony Gordon." Gordon informed Sherman, who tape-recorded the conversation, that the Internal Revenue Service was about to "make a case" on Petitioner, that Gordon had received information from the files of the United States Customs agency, and that Gordon had access to further information from that agency. The affidavit of counsel further stated that it was unknown to counsel whether Gordon relayed unlawfully obtained information from counsel or counsel's office to the government agencies involved.

An affidavit of the prosecution, in response to a defense discovery motion, stated that the investigating agents had informed him that an informant of another federal investigative agency had in the past contacted Petitioner's counsel in an attempt to gather information concerning the defendant.

On the basis of these averrments the District Court held an evidenciary hearing,

with the burden upon the prosecution to establish "that there was no taint whatsoever or no leads or any evidence was ever obtained as a result of that conduct which led or which could have led to the indictment in this case." (R.T. 26-27).

The testimony of one Customs agent, Williams, and two I.R.S. agents, Sherrard and Roach, was then taken. Williams testified that he had been investigating Petitioner and had employed Gordon to aid him in the investigation. Sometime before Gordon went to meet Sherman, Gordon informed Williams that Petitioner had advised Gordon to see his attorney, Sherman. Williams stated that if Petitioner wanted Gordon to see his attorney "go ahead and see him." (R.T. 31). On the day that Gordon visited Sherman, Williams met with Gordon before and after the meeting. Williams then testified that Gordon gave him no information from that meeting regarding Petitioner.

Raymond Sherrard, an I.R.S. agent, testified that in April, 1972, Williams informed him that Petitioner might make a good target for an income tax

investigation. Before the meeting with Petitioner's counsel, Sherrard worked with the Customs agents and met with Mr. Gordon. Sherrard was later informed that Gordon had met with Petitioner's counsel. No information was utilized as a result of that meeting. Emmett Roach, an I.R.S. agent, then testified that he met with Gordon after Gordon's meeting with Petitioner's counsel. Gordon supplied Roach with no information.

At the conclusion of testimony the Court then issued its order dismissimg the indictment, stating:

> "All right. The motion of the defendant to dismiss the Indictment based upon the conduct of the Customs Department in having one of their agents surreptitiously enter the offices of the attorney for the defendant for the purpose of obtaining evidence against the defendant is granted.
>
> "The Court finds that the investigation which had been and was being conducted between the

Customs Department and the Internal Revenue Service was a joint operation. The Internal Revenue Service's investigation of the defendant was being conducted jointly in cooperation with the Customs Department. The Court finds that the deliberate invasion and the deliberate violation of the defendant's Sixth Amendment rights are so irremedial that the Court is required to grant the Motion to Dismiss the Indictment."

This holding should not have been overturned by the Court of Appeals.

The ruling of the Court of Appeals was that the testimony failed to show that information derived from the meeting between Gordon and counsel was utilized by the government. In overturning the ruling of the District Court, however, the Court of Appeals fundamentally misapplied the "substantial evidence" rule.

Basic to an understanding of appellate review is the concept that with

respect to questions such as credibility of witnesses, the trier of fact is entitled to disbelieve the uncontradicted testimony of the party who must sustain the burden of proof. And as questions of credibility fall exclusively within the judgment of the trier of fact, who has the sole opportunity to view the witnesses, a reviewing court may not substitute its determination for that of the trier of fact.

In the case at bench, the government had the burden to establish that its illegal entry of defense counsel's offices by subterfuge did not result in information leading to the indictment. The District Court here had the judicial power to disbelieve the testimony of the agents, who were interested parties, and could then find that the government had not sustained its burden. This is particularly true, in light of the conflict between the out of court statements of the agents and their sworn testimony. The finding of the District Court was within its power as the trier of fact and the Court of Appeals was simply in error in substituting

its judgment for that of the trier of fact.

Fundamental considerations of due process also warrant the conclusion that the order of the District Court was proper even were this Honorable Court to conclude that the evidence failed to show that Petitioner was prejudiced by the illegal governmental activity.

This Court has often declared that it would not engage in "nice" calculations as to the amount of prejudice resulting from an infringement of the Sixth Amendment right to counsel. Not only did the Court of Appeals fail to give full effect to this principle, but it also emaciated the inherent power of the federal court system to fashion appropriate remedial and prophylactic sanctions in cases of clear and extreme governmental misconduct.

The Court below specifically found that "the deliberate invasion and the deliberate violation of the defendant's Sixth Amendment rights are so irremedial that the Court is required to grant the Motion to Dismiss the Indictment." This was well within the authority of the

District Court under its general supervisory powers over criminal prosecutions (Mesarosh v. United States (1956) 352 U.S. 1; Chisum v. United States (9th Cir. 1971) 436 F.2d 645, and to help insure the continued "regularity and fairness which should characterize the administration of criminal justice in the federal courts." (Saldana v. United States (1961) 365 U.S. 646, 647).

The action of the government evidenced a callous disregard for the most fundamental right of a criminal defendant. The order of the District Court was well within its authority to fashion effective relief. The dignity of the judiciary, and its attention to fundamental liberties, should permit it the ability not to tolerate intolerable governmental activity. The illegal acts of the government agencies here was such conduct. (O'Brien v. United States (1967) 386 U.S. 345; Black v. United States (1966) 385 U.S. 26; Hoffa v. United States (1966) 385 U.S. 293).

CONCLUSION

For all of these reasons, a Writ of Certiorari should issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,
RICHARD G. SHERMAN
Counsel for Petitioner

APPENDIX

(REVISED: OCTOBER 3, 1975)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. DENNIS ROY CHOATE, *Defendant-Appellee.*	No. 75-1081 OPINION

[September 15, 1975]

Appeal from the United States District Court
for the Central District of California

Before: WRIGHT and SNEED, Circuit Judges,
and POWELL,* District Judge.

PER CURIAM:

The government appeals from the dismissal of the indictment charging income tax evasion. The appeal is under 18 U.S.C. §3731 as amended January 2, 1971. Two issues are presented:

(1) Was the defendant placed in jeopardy so as to deny this court jurisdiction under 18 U.S.C. §3731 which provides that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution"?

(2) If this court has jurisdiction to entertain the appeal, did the trial court err in dismissing the indictment?

FACTS

The case was called on December 5, 1974. The defendant was questioned about his signature on the jury waiver and two stipulations of fact. Defendant agreed that he had full knowledge and voluntarily signed them. The court directed they be filed. Thereafter the United States Attorney said there were pretrial motions

*Honorable Charles L. Powell, Senior United States District Judge, Eastern District of Washington, sitting by designation.

for disposition. The court then heard the motions. Defendant's motion to dismiss the indictment on the ground of improper conduct of the government agents was granted after the taking of unrefuted testimony.

In August of 1972 Customs Agent Williams hired Tony Gordon as an informant to get information about defendant's alleged narcotics smuggling activities. Gordon established a relationship with Choate. After a period of time Choate suggested that Gordon meet with Choate's attorney. The meeting allegedly was for the purpose of discussing an article Gordon was writing. Gordon informed the Customs agent of the proposed meeting and received authorization for the visit. Gordon met with Mr. Sherman, Choate's attorney, and discussed the current government investigation. Gordon said he would keep Sherman advised of the progress of the investigation for a sum of money. This was in November, 1972.

After Gordon called on Sherman he met with Williams and two agents of the Internal Revenue Service [IRS]. Gordon told about the disclosure of his employment as an informer. He was relieved of his duties as an employee of Customs. He had no further connection with any case involving Choate.

The IRS agents were aware of Gordon's employment by Customs. They had met with him before he called on Sherman but did not know he later was to see Sherman. When the IRS agents talked to Gordon afterward and were told of his disclosure to Sherman, they had no further contact with Gordon. They received no income tax information whatever from Gordon. The first direct contact by an IRS agent with Choate was January 17, 1973. The indictment was returned August 21, 1974.

In granting the motion the trial judge said:

> All right. The motion of the defendant to dismiss the Indictment based upon the conduct of the Customs Department in having one of their agents surreptitiously enter the offices of the attorney for the defendant for the purpose of obtaining evidence against the defendant is granted.
>
> The Court finds that the investigation which had been and was being conducted between the Customs Department and the Internal Revenue Service was a joint operation. The Internal Revenue Service's investigation of the defendant was being conducted jointly in cooperation with the Customs Department. The Court finds that the deliberate invasion and the deliberate violation of the defendant's Sixth Amendment rights are so irremedial [sic] that the Court is required to grant the Motion to Dismiss the Indictment. [R.T. at 103-04].

JURISDICTION

18 U.S.C. §3731 provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

Prior to 1971 the appellate jurisdiction in appeals by the United States was limited by the former §3731. The 1970 Amendments evince a Congressional intent to widen the scope of appealability by the Government to adverse decisions and orders. See S. Rep. No. 91-1296, 91st Cong., 2d Sess. (1970). This Court has jurisdiction "so long as further prosecution would not be barred by the Double Jeopardy Clause." *Serfass v. United States*, 420 U.S. 377, 387 (1975) (footnote omitted); *United States v. Richter*, 488 F.2d 170, 172 (9 Cir. 1973).

The question here, then, is whether the appellee Choate was placed in jeopardy during the proceedings before the district court. The answer is negative.

Appellee argues that acceptance of the waiver of jury trial and the two factual stipulations prior to hearing the motions constituted placing Choate in jeopardy. Appellee places great reliance on *United States v. Hill*, 473 F.2d 759 (9 Cir. 1972). In *Hill* the defendants were charged by indictment with violating an obscenity statute (18 U.S.C. § 1461). Over government objection, the district court took evidence on defendants' motion that the material was not obscene as charged. The district court agreed and dismissed the indictment. In holding that the United States had no right to appeal it was said at 761:

> The court then 'heard' evidence going to the general issue whether the matter mailed was 'obscene,' a necessary element of the offense. . . . What the court held, in substance, was that the defendants before it were not guilty.

eral issue of guilt or innocence while here the district court's decision was on a claimed violation of defendant's right to counsel.[1]

The question of jeopardy is "when a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him [the *Hill* is distinguishable in that the court there passed on the gen-defendant] . . . ." *United States v. Wilson*, 420 U.S. 332, 343 (1975).

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

Jeopardy attaches when the trial commences. This occurs "once the defendant is put to trial before the trier of facts . . . ." *United States v. Jorn*, 400 U.S. 470, 479-80 (1971). The standard applied in a criminal case tried to the court is that jeopardy attaches when the court begins to hear evidence. *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10 Cir. 1936).

Appellee argues that the filing of the two factual stipulations prior to the hearing on defendant's motion to dismiss constituted the taking of evidence within the meaning of this standard. The factual stipulations received by the district court were not considered in its ruling on defendant's pretrial motion. The subject

[1]Selective Service cases are often inapposite. As was stated in *United States v. Walker*, 489 F.2d 1353, 1355 (7 Cir. 1973):

> Under that statutory scheme, judicial review of the classification process is normally unavailable until the registrant is required to defend a criminal charge. In such cases, determination of guilt or innocence typically turns on an analysis of the defendant's Selective Service file. (footnote omitted).

matter of the stipulations was not related to defendant's motion. Rather, these stipulations were prepared in the pretrial stage which is not unusual in criminal tax fraud cases. It is clear the parties understood that the lodging of these stipulations had not put appellee in jeopardy.[2]

To adopt appellee's argument would require a mechanical formula to determine when jeopardy attaches. This approach well could undermine the policies and purposes of the constitutional safeguard. "Whether jeopardy attaches is based on flexible policy considerations rather than hard and fast rules . . . ." *United States v. Brown*, 481 F.2d 1035, 1040 (8 Cir. 1973); *see Illinois v. Somerville*, 410 U.S. 458, 467 (1973); *United States v. Jorn*, *supra* at 480.

Choate was not on trial when the district court dismissed the indictment. "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass v. United States*, *supra* at 391-92. This court has jurisdiction to review the district court's dismissal of the indictment under 18 U.S.C. §3731.

ORDER OF DISMISSAL

As set out above the trial court found that the activities of the government informer violated defendant's Sixth Amendment right. This invasion was found to be so irremediable that the indictment was dismissed.

The Sixth Amendment provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The rationale of the trial court's ruling is not clear. The government informer's contact was with the defendant's attorney, not the defendant. The one meeting far from being surrepti-

[2]THE COURT: All right. The Court will accept that stipulation, also. All right, Mr. Levine or Mr. Sherman, whoever is going to begin.

MR. LEVINE: [government counsel] Your Honor, there are several *pretrial motions* in this matter. I believe the first ones were filed by the defense and the Government has filed one Motion to Quash certain subpenas [sic] and I believe it would be proper to handle these matters prior to the trial beginning.

THE COURT: Yes. Let's hear from you, Mr. Sherman, on your motion first. [R.T. at 15] (emphasis added).

tious, resulted in Gordon telling Sherman of his role as a government informant. Appellee makes no claim that any confidential information was transmitted to Gordon. Sherman could hardly be expected to disclose prejudicial information after Gordon's revelation. While gross surreptitious governmental invasions into the legal camp of the defense *during or in preparation* of a trial may violate defendant's Sixth Amendment right to counsel, *e.g. O'Brien v. United States,* 386 U.S. 345 (1967); *Black v. United States,* 385 U.S. 26 (1966); *Hoffa v. United States,* 385 U.S. 293, 307 (1966); *Caldwell v. United States,* 205 F.2d 879, 881 (D.C. Cir. 1953); *Coplon v. United States,* 191 F.2d 749, 757 (D.C. Cir. 1951), the meeting here occurred in the early stages of the IRS investigation of Choate and 21 months before the return of the indictment.

On the infiltration of defense conferences during a trial Judge Trask recently said:

> This is not to say that government intrusion into the private councils of a *pro se* defendant, struggling to oppose that government during a trial, for the purpose or with the result of gaining trial advantages, is something to be lightly regarded. It is inconceivable that responsible government . . . agencies would stoop to such clandestine and underhanded tactics in the trial of a lawsuit. Such intrusions offend one's sense of fair play and subvert the proper administration of justice. Even without the restraint imposed by the sixth amendment, they may well constitute a denial of due process. Such was not the case here. *United States v. Scott,* ..... F.2d ....., No. 74-2302 (9 Cir. June 18, 1975), (slip op., at 7).

Such activity in the early stages of a government investigation is not subject to the same admonition. The facts are not in dispute. In the government's attempted use of Gordon in the instant case there is no showing of prejudice to the defendant. It is held that the trial court erred in its conclusion that defendant's Sixth Amendment rights had been violated.

REVERSED AND REMANDED.

PERN AU-WALSH PRINTING CO., SAN FRANCISCO 10-6-75—400

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Nov 21 1975
Emil E. Milfi, Jr., Clerk
U. S. Court of Appeals

UNITED STATES OF AMERICA,)

Plaintiff-Appellant, No. 75-1081

v.) ORDER

DENNIS ROY CHOATE,)

Defendant-Appellee.)

Before: WRIGHT and SNEED, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Dec 17 1975
Emil E. Melfi, Jr., Clerk
Court of Appeals

UNITED STATES OF AMERICA,)
Plaintiff-Appellant,
v.) No. 75-1081
DENNIS ROY CHOATE,) ORDER
Defendant-Appellee.) DENYING STAY
OF MANDATE

Before: WRIGHT and SNEED, Circuit Judges.

Appellant's Motion for Stay of Mandate, received by the Clerk on December 5, 1975, is denied. The clerk will issue the mandate at once.

DATED:

APPENDIX D

WILLIAM D. KELLER
United States Attorney
ERIC A. NOBLES
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Chief, Criminal Division
JOEL LEVINE
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Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DENNIS ROY CHOATE, Defendant.	NO. CR 74-1250-F STIPULATION

FILED
December 5, 1974
Clerk, U.S. District Court
Central District of California
By Deputy

It is hereby stipulated to and agreed upon between the United States of America, plaintiff, and Dennis Roy Choate, defendant, and defenant's[sic] attorney of record, as follows, provided:

D-1.

(a) That the stipulation may be admitted in evidence at the trial as conclusive evidence that the stated facts are true; and

(b) That the stipulations shall have the same status and dignity as if it had been put in evidence by the testimony of witnesses and as if they had appended and testified in person; and

(c) That the parties reserve the right to introduce testimony and/or offer evidence (1) to explain the circumstances surrounding an item, document, transaction, or contractual agreement herein stipulated, and/or (2) which may have bearing on the intent of the defendant and the existence of the element of wilfulness, or lack thereof, on the part of the defendant; and

(d) That all documents included in and which are a part of this stipulation are admissible in evidence at the trial for foundation purposes, and said documents are considered to be authentic and true copies of the original documents.

The parties to this stipulation expressly reserve the right to object to the admissibility of these documents on grounds other than authenticity.

1. That Government Exhibits 1, 2, 3 and 4 are true and correct copies of the federal income tax returns of defendant Dennis Roy Choate for the years 1966, 1969, 1970 and 1971. That each of these exhibits contain the signature of defendant Dennis Roy Choate, and were filed in timely manner for each of those years. That no federal income tax returns were filed by Mr. Choate in the years 1967 and 1968.

2. That Government Exhibits 5, 6, and 7 are true and correct copies of the amended federal income tax returns of defendant Dennis Roy Choate for the years 1969, 1970 and 1971. That each of these exhibits was filed on October 3, 1972 and each contains the signature of defendant Dennis Roy Choate.

3. That witnesses are deemed to have been called upon to testify, sworn to and have testified that during the calendar year 1970 defendant Dennis Roy Choate

expended the following amounts of money in the following manner.

(a) $843.00 on June 20, 1970 for the purchase of a 1964 Chevrolet Malibu automobile from Groth Chevrolet Corporation, Huntington Beach, California.

(b) $2,250.00 on December 10, 1970 for a 1967 Porsche automobile from Richard K. Brown, Huntington Beach, California.

(c) $497.43 during the year 1970 for auto repairs performed at Trans-Island Automobile Corporation, Bayshore, New York.

(d) $323.88 during the year 1970 for rent and utilities at an aprtment in Lindenhurst, New York.

(e) $1,198.42 during the year 1970 for rent and assessments at an apartment located at 401 Atlanta, Huntington Beach, California.

(f) $549.03 in payments during 1970 to a Mastercharge account.

(g) $452.43 in payments during 1970 to a Diners Club account.

(h) $697.62 in payments during 1970 to an American Express account.

(i) $388.91 in payments during 1970 to a Carte Blanche account.

(j) $68.50 during 1970 to the State of California for traffic offenses.

(k) $1,205.36 during 1970 for payroll deductions from wages earned at Surf-Jet Manufacturing, Deer Park, New Yorl.

(l) $862.23 during 1970 for payroll deductions from wages earned at Progressive Plastics, Huntington Beach, California.

(m) $2,400.00 during 1970 for estimated cost of living expenditures.

4. That witnesses are deemed to have been called upon to testify, sworn and to have testified to the following items which offset expenditures made by defendant Dennis Roy Choate during 1970.

(a) $111.53 in net increases to the bank accounts of defendant Dennis Roy Choate.

(b) $140.93 from the United States for a tax refund paid to Mr. C Choate for 1969.

(c) $100.00 in advances received by Mr. Choate from a Mastercharge account.

(d) $500.00 for reimbursement of travel expenses from Progressive Plastics, Huntington Beach, California.

(e) $400.00 from Gary Tjernagel for the purchase of a 1964 Volkswagen automobile from defendant Dennis Roy Choate.

5. That Government Exhibit 8, consisting of five pages, are true and accurate copies of applications for credit cards submitted by defendant Dennis Roy Choate during 1970 with the Diners Club, American Express Company and Carte Blanche.

6. That Government Exhibit 9 is a true and accurate summary of the expenditures of defendant Dennis Roy Choate for 1970, as enumerated in paragraphs 3 and 4 above.

7. That Government Exhibit 10 is a true and accurate summary of the tax computations contained in the original and amended 1970 Federal Income Tax Returns filed by defendant Dennis Roy Choate, and shows an additional tax due and owing of $9,839.00 for the year 1970 over and above the income tax claimed to be owed on the original 1970 tax return.

8. That witnesses are deemed to have been called upon to testify, sworn and to have testified that during the calendar year 1971, defendant Dennis Roy Choate expended the following amounts of money in the following manner.

(a) $4,000.00 representing a downpayment for the purchase of 40 acres of land in Lucerne Valley, California. The entire $4,000 was refunded within two months to defendant Dennis Roy Choate.

(b) $2,250.00 in currency for the purchase of a 1971 Datsun automobile on January 7, 1971 from Dot Datson, Huntington Beach, California.

(c) $3,153.00 in currency for the purchase of a 1969 Volkswagen Camper on June 24, 1971 from Harrison Volkswagen, Long Beach California.

(d) $6,735.00 in currency for the purchase of a 1972 Porsche automobile on November 16, 1971 from Circle Porsche Audi, Long Beach, California.

(e) $757.25 in currency paid during 1971 to Circle Porsche Audi, Long Beach, California, for automobile repairs.

(f) $2,000.00 in currency paid on November 22, 1971, for the purchase of a 1972 Volkswagen station wagon from Harbor Volkswagen, Long Beach, California.

(g) $11,805.00 in currency paid during 1971 for the purchase of boats and accessories from The Boat Store, Long Beach, California.

(h) $12,000.00 in currency paid during 1971 for the purchase of boats and Yachts, Long Beach, California.

(i) $290.00 paid during 1971 for rent of an apartment located at 401 Atlanta, Huntington Beach, California.

(j) $1,450.00 paid during 1971 for rent of a single family residence located at 3271 Falkland Circle, Huntington Beach, California

(k) $2,050.00 paid during 1971 for rent of an apartment located at 511 West Bay Avenue, Long Beach,

California.

(l) $836.91 paid during 1971 to a Mastercharge account.

(m) $1,908.53 paid during 1971 to a Diners Club account.

(n) $3,106.35 paid during 1971 to an American Express account.

(o) $999.73 paid during 1971 to a Carte Blanche account.

(p) $200.00 paid during 1971 for membership at the Huntington Harbor Beach Club, Huntington Beach, California.

(q) $130.00 in currency paid to Fran Moore for bookkeeping services performed during 1971.

(r) $112.50 paid to the State of California in fines for traffic offenses.

(s) $148.00 paid to Dr. John W. Faris, III, during 1971 for medical services.

(t) $2,400.00 paid in estimated cost of living expenses during 1971.

9. That witnesses are deemed to have been called upon to testify, sworn and to have testified to the following additional items which offset expenditures made

by defendant Dennis Roy Choate during 1971.

(a) $1,031.17 in net increases to the bank accounts of defendant Dennis Roy Choate.

(b) $936.00 from the United States representing a tax refund for 1970.

(c) $1,950.00 paid to defendant Choate by James Fitzpatrick for the purchase of a 1971 Datsun automobile from defendant Choate.

(d) $2,030.00 paid to defendant Choate by Steve Soden for purchase of a boat and trailer in 1971 from defendant Choate.

(e) $275.00 paid to defendant Choate by Marina Sailboats and Yachts, Long Beach, California, representing a sales tax refund.

10. That Government Exhibit 11 is a true and accurate summary of the expenditures of defendant Dennis Roy Choate for 1971, as enumerated in paragraphs 8 and 9 above.

11. That Government Exhibit 12 is a true and accurate summary of the tax computations contained in the original and

amended 1970 Federal Income Tax Returns filed by defendant Dennis Roy Choate, and shows an additional tax due and owing of $21,994.12 for the year 1971 over and above the income tax claimed to be owed in the original return.

Respectfully submitted,

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United States Attorney

ERIC A. NOBLES
Assistant U.S.Attorney
Chief, Criminal Division

/s/ Joel Levine
JOEL LEVINE
Assistant U.S. Attorney

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United States of America

/s/ Dennis Roy Choate
DENNIS ROY CHOATE
Defendant

/s/ Richard Sherman
RICHARD SHERMAN
Counsel for Defendant

No. 75-1089

In the Supreme Court of the United States

OCTOBER TERM, 1975

DENNIS ROY CHOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

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DENNIS ROY CHOATE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a plea of not guilty to an indictment in the United States District Court for the Central District of California charging petitioner with willfully attempting to evade and defeat income taxes for 1970 and 1971, in violation of 26 U.S.C. 7201, petitioner moved to dismiss the indictment on the ground that a meeting between a government informant and his attorney in November 1972, approximately 21 months prior to indictment, violated his rights under the Fifth and Sixth Amendments to the Constitution. On the day the case was called for trial, a hearing was held on petitioner's motion and, after hearing evidence, the district court dismissed the indictment. The court of appeals reversed and remanded the case to the district court (Pet. App. A).

A petition for rehearing was denied on November 21, 1975 (Pet. App. B). The petition for a writ of certiorari was not filed until February 2, 1976, 73 days after the

denial of rehearing.[1] Thus, under Rule 22(2) of the Rules of this Court, the petition is substantially out of time. At any event, petitioner's claim that the Double Jeopardy Clause barred the government's appeal is without merit.

The pertinent facts are as follows: On December 5, 1974, petitioner's case was called for trial (Tr. 11).[2] At that time, a form indicating that petitioner was waiving trial by jury was presented to the trial judge (Tr. 11; Pet. App. A 1). The court then questioned petitioner whether his waiver was freely and voluntarily made and he assured the court that it was (Tr. 11-13; Pet. App. A 1). The court also questioned petitioner concerning two stipulations of fact which had been presented to the court (Tr. 13-15; Pet. App. A 1). After establishing that petitioner was fully aware of his right to confront and cross-examine all witnesses against him and of the effect of the stipulations, the court accepted the stipulations (Tr. 14-15; Pet. App. A 1).[3] The prosecutor then advised the trial court that there were certain pretrial motions for consideration (Tr. 15; Pet. App. A 1-2). After considering several other matters, an evidentiary hearing was held on the motion to dismiss the indictment because of the government informant's contact with petitioner's counsel.

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[1]On December 18, 1975, petitioner filed an application for an extension of time to and including January 19, 1976, within which to file his petition for a writ of certiorari. On December 23, 1975, Mr. Justice Rehnquist denied the application.

[2]"Tr." refers to the consolidated transcript of the arraignment proceedings and the hearing on the motion to dismiss the indictment.

[3]One of the stipulations was dated December 5, 1974 (Tr. 14). The court was unaware of the other stipulation, which had been filed November 29, 1974, until advised of its existence by defense counsel (Tr. 14-15).

The evidence adduced at the hearing established that in August 1972, Lynn Williams, a United States Customs agent, hired Tony Gordon as an informant to obtain information about petitioner's alleged narcotics smuggling activities (Tr. 29-30; Pet. App. A 2). The informant subsequently met petitioner and, at some point in time, petitioner suggested that Gordon meet with petitioner's attorney, Richard Sherman (Tr. 31-32; Pet. App. A 2). The alleged purpose of the meeting, which took place in November 1972, was to discuss an article that Gordon was writing about narcotics smuggling and the insulation of Gordon from any possible incrimination as a result of the article (Tr. 33, 37; Pet. App. A 2). Gordon informed Agent Williams of the scheduled meeting with Sherman, and although Gordon received authorization to meet with the attorney, he was given no specific instructions on what he should do (Tr. 32, 36-37; Pet. App. A 2). Gordon then met with Sherman (Tr. 33, 38; Pet. App. A 2).[4] At the meeting, Gordon advised Sherman that he was working as an informant for the United States Customs Service, which was investigating petitioner for smuggling cocaine. Gordon told Sherman that he would keep Sherman advised of the progress of the investigation in return for pay (Tr. 40, 43, 45, 50, 65, 66; Pet. App. A 2). Sherman tape-recorded the conversation with the informant (Tr. 35, 39-40).[5]

After Gordon met with Sherman, he was questioned by Agent Williams and two agents of the Internal Revenue Service (Tr. 38-40; Pet. App. A). Gordon admitted to the agents that he had told Sherman that he was employed as an informant (Tr. 43, 45, 66; Pet. App. A 2).

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[4]Sherman has represented petitioner throughout all of the proceedings in this case.

[5]Petitioner did not produce this recording at the evidentiary hearing.

Thereafter, Gordon was not utilized any further and had no additional contact with any case involving petitioner (Tr. 44, 75; Pet. App. A 2).

Although an agent of the Internal Revenue Service had met with Gordon sometime prior to Gordon's meeting with Sherman, the agent was not aware that Gordon was to meet with Sherman (Tr. 61-65; Pet. App. A 2). The agents of the Internal Revenue Service received no useful income tax information concerning petitioner from Gordon, nor did they receive any useful information from Gordon through Agent Williams (Tr. 33-34, 62-63, 67, 71-72, 76-78, 83-89; Pet. App. A 2). The indictment against petitioner was thereafter returned August 21, 1974 (Pet. App. A 2).

On these facts, the court of appeals concluded that the meeting between the government informant and petitioner's attorney 21 months before the return of the indictment was in the early stages of the Internal Revenue Service investigation and did not prejudice petitioner's rights. It therefore held that the district court erred in dismissing the indictment (Pet. App. A 5-6).

1. In *Serfass* v. *United States*, 420 U.S. 377, 388, this Court observed that "[i]n a nonjury trial, jeopardy attaches when the court begins to hear evidence." Relying upon the fact that after he had waived trial by jury, the district court accepted and ordered two stipulations of fact to be filed before ruling on the motion to dismiss, petitioner contends (Pet. 8-13) that jeopardy had attached prior to the entry of the dismissal order because the court had begun to "hear evidence" and, accordingly, the government's appeal was barred by the Double Jeopardy

Clause.[6] But the court of appeals correctly characterized this argument as a "mechanical formula" (Pet. App. A 5). Until the court in a nonjury trial actually begins to consider evidence on the question of guilt, there is no risk of a determination of guilt.

Here, the trial court never considered any evidence going to the question of guilt. The filings of the factual stipulations, prior to conducting any other proceedings, were unrelated to either the motion for dismissal or to the question of petitioner's guilt. Neither the court nor the parties intended that the factual stipulations would be considered by the court prior to the disposition of various pretrial matters and it is quite clear that the stipulations were never considered by the trial court in ruling upon the motion to dismiss. When the hearing on the motion to dismiss took place, petitioner had not as yet faced the risk of a determination of guilt and thereby been placed in jeopardy.[7] "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass* v. *United States, supra,* 420 U.S. at 391-392. Thus, the court of

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[6] 18 U.S.C. 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[7] In *Bunnell* v. *Superior Court*, 13 Cal.3d 592 (Cal. Sup. Ct.), relied upon by petitioner (Pet. 10-12), neither the parties nor the court contemplated any pretrial proceedings, and, indeed, the trial court had already read the transcript of the preliminary examination which the parties had submitted to the court as the basis for decision and had decided the defendant's guilt (13 Cal.3d at 599, n. 3). In those circumstances, the filing of the transcript presented the defendant with the risk of a determination of guilt.

appeals correctly concluded that petitioner "was not on trial when the district court dismissed the indictment" (Pet. App. A 5) and properly held that the government's appeal was not precluded by the Double Jeopardy Clause.

2. Petitioner further claims (Pet. 13-20) that the court of appeals erred in holding that his Sixth Amendment rights had not been violated. The meeting between Gordon and petitioner's counsel took place approximately 21 months prior to indictment and prior to any other formal prosecutorial proceedings. Accordingly, at that time, petitioner's Sixth Amendment right to the assistance of counsel had not yet attached and Gordon's contact with the attorney did not intrude upon any attorney-client relationship protected by the Sixth Amendment guarantee. See, *e.g., Kirby* v. *Illinois,* 406 U.S. 682, 688-690; *United States* v. *Ash,* 413 U.S. 300. Moreover, the meeting did not prejudice petitioner's rights. At the first and only meeting between the informant and Sherman, petitioner's lawyer, the informant immediately disclosed his role. As the court of appeals noted (Pet. App. A 6), "Sherman could hardly be expected to [have] disclose[d] prejudicial information after Gordon's revelation." The testimony of the agents that they received no information from the informant was uncontradicted, and neither here nor in the court below has petitioner claimed any prejudice other than the mere contact with his attorney. On these facts, the court of appeals correctly concluded that petitioner had suffered no prejudice.[8]

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[8]Petitioner argues (Pet. 17-19) that the conclusion of the court of appeals that no information from the meeting was utilized by the government fails to give proper deference to the findings of the district court. But the district court did not find either that information had been utilized or that the government had failed to establish that no information had been utilized. Instead, the district court held that the mere contact was an irremediable violation of petitioner's rights (Tr. 103-104; Pet. App. A 2-3), a conclusion contrary to *O'Brien* v. *United States,* 386 U.S. 345, and *Black* v. *United States,* 385 U.S. 26.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.